STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2006
v	No. 259971 Oakland Circuit Court
WILLIE LEWIS HARDY, Defendant-Appellant.	LC No. 04-196440-FH

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of possession with intent to deliver between 50 and 449 grams of cocaine, MCL 777.7401(2)(a)(iii), possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, possession of marijuana, second offense, MCL 333.7403(2)(d); MCL 333.7413(2), felon in possession of a firearm, MCL 750.224f, felony-firearm, MCL 750.227b, and assaulting, resisting and obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 8 to 20 years' imprisonment for the possession with intent to deliver between 50 and 449 grams of cocaine conviction, two years' imprisonment for the first felony-firearm conviction, one to two years' imprisonment for the possession of marijuana, second offense conviction, 2 to 15 years' imprisonment for the felon in possession of a firearm conviction, two years' imprisonment for the second felony-firearm conviction, and 2 to 15 years' imprisonment for the assaulting, resisting and obstructing a police officer conviction. We affirm.

I.

Defendant maintains that, contrary to the Fourth Amendment, the police exceeded the scope of the protective sweep of his apartment. This issue is unpreserved because, though defendant raised this issue below, he appeals on different grounds.[1] See *People v Griffin*, 235

[1] Prior to trial, defendant argued at an evidentiary hearing that the initial entry into his apartment was improper. At trial, defendant contended that there was no basis for the police to obtain a search warrant. However, on appeal, defendant says that the evidence should be suppressed (continued…)

Mich App 27, 44; 597 NW2d 176 (1999). We review unpreserved constitutional issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To warrant reversal, the plain error must result in the conviction of an innocent defendant or must seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id*. at 774, applying *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v Bolduc*, 263 Mich App 430, 437; 688 NW2d 316 (2004). The search of a home is generally unreasonable absent a warrant issued on the basis of probable cause. *Maryland v Buie*, 494 US 325, 331; 110 S Ct 1093; 108 L Ed 2d 276 (1990). However, "[t]he Fourth Amendment permits a properly limited protective sweep in connection with an in-home arrest if the police reasonably believe that the area in question harbors an individual who poses a danger to them or to others." *People v Beuschlein*, 245 Mich App 744, 757; 630 NW2d 921 (2001), citing *Buie*, *supra* at 337. Furthermore, once police officers are lawfully in a position to view an item pursuant to a protective sweep, they may seize items if their incriminating character is immediately apparent. *Beuschlein*, *supra* at 758, citing *People v Champion*, 452 Mich 92, 101-102; 549 NW2d 849 (1996).

Defendant concedes that the police officer had the authority to open defendant's closet to search for an attacker, but he argues that the officer could not validly open a closed case or search the closet where he found a partially-opened shoebox. However, defendant's argument is not consistent with the testimony from the evidentiary hearing. After the police officer found a loaded rifle in the bedroom, the officer noticed a shiny metal object inside an open closet that appeared to be a handgun. Because two men (who were still in the apartment) had come from the back of the apartment toward the police officers before the protective sweep, and because a police officer found a loaded rifle, it was reasonable, for the police officer's safety, to inspect the partially-opened case in plain view that appeared to contain a handgun. See *People v Shaw*, 188 Mich App 520, 524; 470 NW2d 90 (1991) (police may search closets and other places immediately adjoining the arrest during a protective sweep).

Moreover, next to the case, the police officer also observed a partially-opened shoebox in which he could see knives and marijuana. Because marijuana was found in plain view in conjunction with a legally conducted protective sweep and because its incriminating character was immediately apparent, it was proper for the police officer to seize the marijuana that he saw inside the partially-opened shoebox.[2] *Beuschlein*, *supra* at 758. For these reasons, the police did not exceed the scope of the protective sweep.

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because the police exceeded the scope of the protective sweep.

[2] Defendant also claims that the cocaine seized pursuant to the search warrant must be suppressed, but he makes no argument to support this assertion. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position . . . Failure to brief a question on appeal is tantamount to abandoning it." *People v Kevorkian,* 248 Mich App 373,

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II.

Defendant also argues that the trial court denied him his constitutional right to present evidence to support his case. We review a trial court's evidentiary ruling for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). For an abuse of discretion to exist, an unprejudiced person must conclude that there was no justification or excuse for the ruling after considering all the facts. *People v Rice* (*On Remand*), 235 Mich App 429, 439; 597 NW2d 843 (1999).

Defendant specifically maintains that the trial court erred when it prohibited him from presenting testimony that one of the people in the apartment when the police arrived, Andrew Warren, was later arrested on cocaine charges. According to defendant, in both Warren's and defendant's cases, the police found cocaine in a kitchen drawer while Warren was present. Therefore, defendant argues that evidence that Warren was arrested under similar circumstances constitutes relevant, admissible evidence of defendant's innocence.

We hold that defendant's argument fails for two reasons. First, as the prosecutor points out, Warren invoked his Fifth Amendment right and did not testify in this case. Therefore, while MRE 608(b) permits cross-examination about instances of misconduct if they bear on the witness's truthfulness or untruthfulness, the rule does not apply if a witness has not testified at trial or if the alleged conduct does not establish truthfulness. Further, to the extent defendant asserts that the evidence should have been admitted pursuant to MRE 404(b)(1), evidence offered to establish that a witness may have acted in conformity with his other bad acts is expressly prohibited by the court rule. *People v Catanzarite*, 211 Mich App 573, 580; 536 NW2d 570 (1995). As the Court explained in *Catanzarite*, the most this evidence may establish is that Warren acted in conformity with drug trafficking on a different occasion – a purpose prohibited by MRE 404(b). *Id*. at 580. Further, that Warren was arrested on a single, other occasion does not show that he uses a modus operandi, as defendant argues, of hiding cocaine indiscriminately in a kitchen drawer as his " 'unique and distinctive style.' " See *People v VanderVliet*, 444 Mich 52, 66; 508 NW2d 114 (1993), quoting *People v Golochowicz*, 413 Mich 298, 311; 319 NW2d 518 (1982). Accordingly, because evidence of Warren's arrest is not relevant and would be offered to show propensity to commit a crime, the trial court correctly ruled that the evidence is inadmissible. *VanderVliet*, *supra* at 74-75.

III.

Defendant also contends that the prosecutor presented insufficient evidence to convict him of the drug and firearm possession offenses. We review a challenge to the sufficiency of the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). In reviewing the evidence, we ask whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

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389; 639 NW2d 291 (2001).

Defendant raises the single argument that, for each offense, the evidence was insufficient to establish the element of possession. To be guilty of possessing contraband, the prosecutor must show actual or constructive possession. *Wolfe*, *supra* at 519-520. With regard to narcotics, a person has possession when the person has "dominion and control" over the narcotics. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). More specifically, "a defendant 'need not have [the drugs] literally in his hands or on premises that he occupies but he must have the right (not the legal right, but the recognized authority in his criminal milieu) to possess them . . . .' " *Id*., quoting *United States v Manzella*, 791 F2d 1263, 1266 (CA 7, 1986). Further, possession with intent to deliver may be established by direct evidence as well as circumstantial evidence and reasonable inferences arising from that evidence. *People v Hunter*, 466 Mich 1, 7; 643 NW2d 218 (2002). Regarding a firearm, a person has possession when the person has knowledge of the firearm's location and the firearm is reasonably accessible to the person. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). Possession of a firearm also may be established by direct or circumstantial evidence. *Id.*

Here, it is reasonable to infer that defendant had the right to control the drugs because the police found cocaine in the same drawer as an electric bill and lease information addressed to defendant and they found marijuana in defendant's hall closet inside a shoebox. Moreover, in the kitchen, the police also found items such as torn baggies and a digital scale that are typically used in drug operations. Concerning the rifle, it is reasonable to infer that defendant knew about the rifle's location because the police found the rifle in plain view in defendant's bedroom where defendant also kept correspondence addressed to him. Furthermore, defendant clearly had access to the rifle because police found defendant in the living room, only fifteen feet away from the bedroom. Clearly, sufficient evidence supported defendant's convictions.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder